Supreme Court, U.S.
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No. 99-956

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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5 pp

QUESTION PRESENTED

Whether a State or state agency is a "person" subject to potential liability under the False Claims Act, 31 U.S.C. 3729 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (99-774 Pet. App. 1a-2a)* is not reported. The opinion of the district court (99-774 Pet. App. 3a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1999. Petitions for a writ of certiorari were filed on November 2, 1999 (No. 99-774) and November 3, 1999 (No. 99-779). The conditional cross-petition for a

* References to "99-774 Pet. App." are to the appendix to the petition for a writ of certiorari in *United States* v. *Texas*, No. 99-774.

writ of certiorari was filed on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits a variety of deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(1)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a). Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); 99-774 Pet. 3.

2. The instant case involves a *qui tam* action filed by James M. Churchill. The defendants included the State of Texas and three state agencies. Those state entities are the cross-petitioners in this Court. The district court denied the state defendants' motion to dismiss the *qui tam* claims against them. 99-774 Pet. App. 3a-41a. The court of appeals reversed, holding that the suit was barred by the Eleventh Amendment. *Id.* at 1a-2a; see 99-774 Pet. 5.

3. The United States and the relator each filed a petition for a writ of certiorari. See *United States* v. *Texas*, No. 99-774; *United States ex rel. Churchill* v. *Texas*, No. 99-779. Those petitions present the question whether the Eleventh Amendment bars a *qui tam* suit against a State or state agency. The petitions are currently pending before this Court.

DISCUSSION

The conditional cross-petition for a writ of certiorari argues (at 16) that, if this Court grants certiorari in No. 99-774 and/or No. 99-779, it should also consider the question whether a State or a state agency is a "person" subject to potential liability under 31 U.S.C. 3729(a). On November 29, 1999, this Court heard oral argument in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. That case presents the same question of statutory interpretation that is presented in the conditional cross-petition here, as well as the same Eleventh Amendment question that is presented in Nos. 99-774 and 99-779. See 98-1828 Pet. at i. The conditional cross-petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828 (argued Nov. 29, 1999), and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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FEBRUARY 2000